

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

WARD KIDDER,

Plaintiff,

v.

Case No. 13-CV-391 KG/CG

INTEL CORPORATION,

Defendant.

ORDER

This matter comes before the Court on Defendant's Motion for Summary Judgment and Supporting Memorandum Brief. (Doc. 45). Plaintiff filed a response, and Defendant filed a reply. (Docs. 54, 55). In Plaintiff's response, Plaintiff cites to his deposition in which he recalls a conversation that he had with Abad Valdez. Plaintiff's deposition testimony is as follows:


I was approached by Abad Valdez, who was the Axcelis C4 engineer main time frame of 2010, and through – through conversation about my illness, he said "We should have had you wear a OSHA mask to protect you from lead." And I said, "There's lead in those tools?" And he said, "Yeah."

(Doc. 54-1) at 4 (depo. at 68). In Defendant's reply, Defendant argues for the first time that Valdez's statements to Plaintiff are inadmissible hearsay.

The Tenth Circuit Court of Appeals has held that, when a district court accepts a reply brief from a movant that contains new material or argument, the court must either: (1) permit a surreply from the nonmovant, or (2) refrain from relying on the new material or argument in ruling on the motion. *See Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1164 (10th Cir. 1998). Because Defendant argues that Valdez's statements are hearsay in its reply for the first time, the Court *sua sponte* permits Plaintiff to file a surreply, on or before July 11, 2014, in order to address whether Valdez's abovementioned statements fall within an exception to the hearsay

rule. *See Callies v. Lane*, 2013 WL 5781147 (D. Colo.) (court *sua sponte* allowed party to file surreply).

IT IS THEREFORE ORDERED that on or before July 11, 2014, Plaintiff may file a surreply limited to discussion of whether Valdez's statements to Plaintiff fall within an exception to the hearsay rule.



UNITED STATES DISTRICT JUDGE